Supreme Court, U.S.
FILED
JUN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM R. COULSON*
CHERRY & FLYNN
30 North LaSalle Street
Suite 2140
Chicago, Illinois 60602
(312) 372-2100

SUSAN M. KEEGAN
30 North LaSalle Street
Suite 2140
Chicago, Illinois 60602
(312) 372-2100
Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner, a tax protestor, convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that many of petitioner's beliefs are deemed "objectively unreasonable as a matter of law." The result is that petitioner – despite the sincere good faith on which he based his defense – can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique approach, under which petitioner was convicted and jailed because a panel announced that his sincerely-held beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which Petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REPLY STATEMENT OF THE CASE 1

REPLY ARGUMENT 3

I. STATUTORY CONSTRUCTION 3

II. CONSTITUTIONAL ISSUES 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Cabana v. Bullock, 474 U.S. 376 (1986) 16

Cheek v. Doe, 828 F.2d 395 (7th Cir. 1987), *cert. denied*, 484 U.S. 955 (1987) 2

Marks v. United States, 430 U.S. 188 (1977) 14

Morissette v. United States, 342 U.S. 246 (1952) 16

Sandstrom v. Montana, 442 U.S. 510 (1979) 16

Sansone v. United States, 380 U.S. 343 (1965) 9

United States v. Bishop, 412 U.S. 346 (1973) 4, 5, 7, 9, 11, 13

United States v. Buckner, 830 F.2d 102 (7th Cir. 1987) .*passim*

United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989) .*passim*

United States v. Dack, 747 F.2d 1172 (7th Cir. 1984) .. 14, 15

United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990) . 18, 19

United States v. Moore, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) 14

United States v. Murdock, 290 U.S. 389 (1933) .... *passim*

United States v. Pomponio, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976) 4, 5, 7, 11, 13

United States v. Schiff, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987) 8

United States. v. Schulman, 817 F.2d 1355 (9th Cir. 1987), *cert. dismissed*, 483 U.S. 1042 (1987) 10

United States v. Toushin, 899 F.2d 617 (7th Cir. 1990) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Title 18, U.S.C., Sec. 287 7

OTHER AUTHORITIES

F. Moore, *Crowell's Handbook of Gilbert and Sullivan*, 69-76 (1962) 19

No. 89-658

In The

Supreme Court of the United States

October Term, 1989

JOHN L. CHEEK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

REPLY STATEMENT OF THE CASE

The Government's recitation of trial facts seems designed to propagate two erroneous impressions. First, the emphasis only on selected facts sounds the Government's theme that its evidence of willfulness at trial was overwhelming, and that Cheek's "misunderstanding of his duty to file" defense was wholly frivolous. If this were so, however, then the Government would surely not have needed the helping hand of *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), and *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989), to gain this conviction.

As recited in our Brief's Statement of the Case, the genesis and development of Cheek's asserted misunderstanding of the law (as the Seventh Circuit calls it – "belief") were based on various sources, including attorney letters, seminars, and manuals. After the supplemental jury instructions, most of this became irrelevant, of course, because Cheek's misunderstanding had been placed on the Seventh Circuit's forbidden list. However, it cannot fairly be said that Cheek's defense was anywhere near frivolous. And both the trial court and the jury indicated that the fact issues were close ones (*Petitioner's Br.*, pp. 9-13).

Buckner-Cheek helps the Government gain criminal convictions precisely in those situations where such help is least appropriate: the close cases.

Second, and related to the first observation, the Government's recitation of trial facts overstates the relevance and weight to be given the various judicial rulings to which Cheek was a party (*Gov't Br.*, pp. 3-5). Each of the cited judicial rulings was admitted at trial against the *pro se* Cheek, even though *none* of them could possibly be relevant to willfulness on each count of the indictment. For example, the Government cites as evidence of Cheek's obdurate refusal to acknowledge the law the Seventh Circuit's decision in *Cheek v. Doe*, 828 F.2d 395 (7th Cir. 1987), *cert. denied*, 484 U.S. 955 (1987). (*Gov't Br.*, p. 5). However, that decision was issued on June 5, 1987, *after* the latest date of any alleged offense in Cheek's indictment. It is clearly not relevant to Cheek's knowledge or lack thereof on the prior dates of the alleged offenses. The Government also recites evidence of two judicial rulings against Cheek which occurred in March of 1984 (*Gov't Br.*, p. 4). These March 1984 events could not possibly be relevant to Cheek's willfulness on Counts One, Two, Three, Four, and Five of the indictment, because those offenses allegedly were committed prior to March 1984. (See *Jt.App.* 5-15). Thus, the admissibility of these rulings at a trial of all ten counts can be seriously

questioned (an evidentiary issue concededly not before this Court). However, these judicial decisions must be given zero weight in assessing Cheek's willfulness (or lack thereof) on the main counts of the Government's indictment.[1]

Of course, the central thrust of our position is that Cheek was entitled to have a jury decide whether he acted with criminal intent. Thus, the weight or the strength of the Government's case at trial is now largely irrelevant. It does not assist this Court or the Government's position, however, for the Government to overstate the strength of its trial evidence.

It is sufficient to note that Cheek's criminal intent was hotly contested at trial and that his defense was hardly frivolous under any sufficiency standard.

REPLY ARGUMENT

I. Statutory Construction

The Government's argument wholly misconstrues Cheek's position. Cheek's defense was a traditional *Murdock*[2] defense to willfulness: that he harbored a *bona fide* misunderstanding of his duty to file and pay income taxes. The Government twice mischaracterizes this position.

The Government first says that Cheek argues that a person is not guilty of violating the tax laws when the person is aware of his duty under the Code, but does not subjectively believe in that view of the law (*Gov't Br.*, pp. 12-13, 21). This is not Cheek's position. This formulation smacks of mere disagreement with known law. Such a

---

[1] The Government's facts omit any recitation of the contrary advice Cheek was given by the "tax protesters," which included judicial opinions (doubtless misinterpreted for Cheek).

[2] *United States v. Murdock*, 290 U.S. 389 (1933).

disagreement with known law is not a defense, as the *Cheek* jury was instructed (*Jt.App.* 75). Second, the Government argues that Cheek knew of his duties under the Code, but believed that there was some legal ground that excused him from having to comply with these requirements (*Gov't Br.*, pp. 12, 18). The Government, after making this equally erroneous formulation of Cheek's defense, has the further temerity to assert that *Buckner-Cheek* "afforded petitioner added protection" (*Gov't Br.*, pp. 12, 18), and to characterize Cheek's resistance to *Buckner-Cheek* as the urging of an "extension" of the *Murdock* defense (*Gov't Br.*, p. 13).

For the Government to thus claim that *Buckner-Cheek* represents settled law, and that Cheek is urging some departure from settled law, is to stand history and precedent on its ear. It is most certainly disingenuous for the Government to tell this Court that the doctrine it is urging to become the law of the land is one which will afford tax protesters added protection!

The observation deserves to be repeated: In faulting Cheek for failing to appreciate "that the [*Buckner-Cheek*] instruction added to, rather than detract[ed] from, [his] protections" (*Gov't Br.*, p. 18), the Government makes the unwarranted and erroneous factual assertion that Cheek knew his legal duty in the *Bishop*[3] and *Pomponio*[4] sense (*Gov't Br.*, pp. 12, 16-17). The Government further states that Cheek's defense was that while he knew his legal duties, he in good faith believed that there was some legal ground that excused him from performing those duties. This, of course, was never Cheek's defense. Again, Cheek's defense was that, per *Murdock*, he had a *bona fide* misunderstanding as to *his* duty to file and to pay taxes. The *Murdock* issue is *Cheek's* understanding of *Cheek's* duty to file. Indeed, if the Government could prove

---

[3] *United States v. Bishop*, 412 U.S. 346 (1973).

[4] *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976).

beyond a reasonable doubt that Cheek knew his legal duty (and intentionally violated it), then the Government would have its conviction, even under the subjective intent instructions prevailing everywhere but the Seventh Circuit.

The Government appears to have trouble with the use of the term "beliefs" in this context. The term "beliefs" is not ours, but is the term used by the Seventh Circuit. See *Cheek*, 882 F.2d at 1267-69. Apparently, the Seventh Circuit uses the term "belief" synonymous with the term "misunderstanding" from *Murdock*. Thus, the Government is wrong when it tells this Court that "petitioner appears to use the term 'belief' to refer to matters of personal faith and conviction . . . " (*Gov't Br.*, p. 14).

Petitioner does agree with the Government's starting point that this Court has defined "willfully" in the tax context simply as "a voluntary intentional violation of a *known* legal duty." (*Gov't Br.*, p. 21). *Murdock* and its progeny also make it clear that it is a defense to "*knowing*" one's legal duty if one has a "*bona fide* misunderstanding" of his duty to file a return and pay a tax. *Murdock, supra*, at 396. These instructions, taken from this Court's cases, define what has come to be known as the subjective standard for the mistake of law defense in tax cases. No additional jury instructions should be necessary. Contrary to the Government's argument that the Seventh Circuit is trying to help the beleaguered tax protesters, *Buckner-Cheek* imposes an additional standard on this defense, namely that of objective reasonableness of the *substance* of a proffered belief or misunderstanding. As we stated in our Brief, *Buckner-Cheek* ignores any consideration being given to the *genesis* or *basis* of the belief or misunderstanding, and focuses solely on its substance. This strange new requirement is flatly inconsistent with *Murdock*, *Bishop*, and *Pomponio*.

The Government further strains credulity by posing *Murdock* as this Court's seminal decision which supports the Government's position. *Murdock* nowhere stands for

the proposition that the willfulness determination can be taken from the jury, as the second prong of *Buckner-Cheek*, the "pre-emptive strike" prong, does. The Government ignores the central holding of *Murdock*, in which this Court makes clear that Congress did not intend that a person by reason of a *"bona fide* misunderstanding . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *Murdock, supra*, at 396. The Government now urges upon this Court the very result which this Court condemned in 1933. The Government's Brief (p. 23) quotes various willfulness formulations which *Murdock* used to exemplify definitions found in various statutes. *Murdock's* willfulness formulation nowhere suggests that the rule of objective reasonableness properly limits the defense, as argued by the Government. (*Gov't Br.*, p. 23). The Government suggests that, based on *Murdock's* sample formulations of willfulness, "the defendant's subjective belief must have at least some concrete basis in extrinsic circumstances." (*Gov't Br.*, p. 24). While this observation was not a part of *Murdock's* holding, we agree with it. Any defense offered by any defendant in any criminal case must have some "concrete basis in extrinsic circumstances" before the defendant is entitled to a jury instruction on the defense. In this case, of course, there is substantial evidence of the "basis in extrinsic circumstances" for Cheek's asserted beliefs or misunderstandings: his attendance at seminars and lectures, some of them given by lawyers. The Government's reliance on *Murdock* is ephemeral. *Murdock* supports Cheek's position.[5] Jury instructions based on

---

[5] After surveying the various willfulness definitions from other statutes, *Murdock* (290 U.S. at 393) held that under the tax laws it was error for the trial court to have denied this jury instruction:

> "If you believe that the reasons stated by the defendant in his refusal to answer questions were

(Continued on following page)

Murdock, Bishop, and *Pomponio* would be more than adequate to protect the statutory and constitutional interests of both the Government and tax protester defendants. *Murdock* stands for the proposition that it is up to the jury to determine whether a tax defendant's conduct is willful.

The Government relegates to footnote 7 of its Brief (p. 8) the erroneous suggestion that petitioner "does not appear to challenge" his conviction on the false-claim-for-tax-refund count (Count V – 18 U.S.C. 287; *Jt.App.* 10). This is patently specious. As the Court of Appeals below noted, "all of the crimes of which Cheek was convicted require willfulness." *Cheek*, 882 F.2d at 1267. The Seventh Circuit then applied its *Buckner* analysis to all of the charges, including Count V. *Id.* at 1267-68. Likewise, the trial court's theory of defense instruction, as well as its supplemental instruction, apply *Buckner* to all of the charges in the indictment. (*Jt.App.* 80-81; 87-88). Especially when Section 287 is applied, as here, to a claim for an income tax refund, the analysis of *Buckner's* fatal defects under the Title 26 charges is fully applicable to it as well. The Government thus unintentionally does point out yet another error in Cheek's trial: the failure to expressly tell the jury that willfulness was an element of Count V. (*Jt.App.* 78-79). In any event, *all* of the counts on which Cheek was convicted stand or fall based on the validity of the *Buckner-Cheek* doctrine.

The Government even claims to find a friendly haven in *Bishop*. (*Gov't Br.*, pp. 26-27). *Bishop* expressly rejected a Ninth Circuit holding that there could be a tax conviction upon a showing of "unreasonable, capricious, or careless disregard for the truth." In *Bishop* this Court stated, "Degrees of negligence give rise in the tax system to civil

---

(Continued from previous page)

> given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was willful."

penalties." *Id.* at 361. Yet the Government wants this Court to impose a reasonableness or negligence standard, as if such had been the law all along.

The Government even argues with us as to the line-up of the Circuits. (See *Gov't Br.*, p. 19, n.11). It was the Seventh Circuit itself in *Cheek* that acknowledged that the *Buckner-Cheek* doctrine was contrary to these seven Circuits which have considered the question – the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. Apparently the Government takes issue with the Seventh Circuit's inclusion of the Second, Fourth, and Sixth Circuits in this list. As to the Second Circuit, the Government cites *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987). In *Schiff*, the subjectively reasonable instruction was given by the district court and the Second Circuit's statement in *Schiff* was clear *dictum*. Clearly, as the Seventh Circuit recognized, in both the Fourth and the Sixth Circuits no "objectively reasonable" requirement has ever been imposed. Those Circuits, indeed, have never squarely been faced with the objectively reasonable requirement, because apparently the Government has not had the temerity to urge it upon those Circuits in tax protester cases. We did not in our Brief, as the Government erroneously contends, state that the jury instructions approved by the Seventh Circuit would be rejected by ten other Courts of Appeals. Rather, we indicated that in those ten Circuits no "objectively reasonable" requirement has ever been imposed. As apparently even the Government does concede, the First, Fifth, and Tenth Circuits have expressly rejected the objectively reasonable requirement. Whether one looks at our count of the Circuits, the Seventh Circuit's count of the Circuits, or the Government's count of the Circuits, it is clear that the *Buckner-Cheek* doctrine is unique to the Seventh Circuit; and even the Circuits that both sides want to count, such as the Fourth, Sixth, and Ninth, have never imposed it.

Next, the Government argues that the *Buckner-Cheek* doctrine is supported by the policies of the tax laws. (*Gov't Br.*, 27-29). In *Bishop*, of course, this Court made clear that it was the intent of Congress to construct a range of penalties that distinguish the purposeful tax violator from the "well-meaning but easily confused" mass of taxpayers. And, indeed, the tax collection policies which Congress has enacted have made criminal prosecution only a part. Thus, even if criminal intent is lacking, the Government has myriad civil and administrative remedies to collect not only taxes owed but also substantial penalties and interest. Criminal prosecution is to be viewed as a last resort sanction, not as a vehicle to punish tax protesters whose views are annoying to the Government. *Sansone v. United States*, 380 U.S. 343, 350 (1965). The *Buckner-Cheek* doctrine will not, as the Government urges, separate the purposeful tax violator from the well-meaning but confused taxpayer. (*Gov't Br.*, pp. 14, 28). Under *Buckner-Cheek*, if petitioner were a confused taxpayer, he would be found guilty, because his particular confusion is on the forbidden list. Cheek is not, as the Government states, one "who is aware of the requirements of the tax laws . . . but seeks to exempt himself through reliance on some frivolous proposition. . . . " (*Gov't Br.*, p. 78). It should have been the Government's burden at trial to prove to the jury beyond a reasonable doubt that Cheek had such awareness. Stating that conclusion in a brief is not enough. In any event, Cheek is entitled to have a jury make the distinction and decide whether he acted with criminal intent or naive gullibility. We do agree that *Buckner-Cheek* would, as the Government urges, induce prompt and forthright fulfillment of every duty under the income tax law. (*Gov't Br.*, p. 28). It would do so, however, by making income tax felonies virtually strict liability offenses. Both Congress and the Constitution, however, stand in the way of such a result.

The Government states, as if it were an established fact (*Gov't Br.*, p. 29), that Cheek is an individual who has

clung to a theory despite his awareness of judicial decisions firmly rejecting his theory, and that Cheek therefore knows his duty, even if he refuses to believe that the courts are correct. This, again, was not Cheek's defense. It was the Government's theory at trial. And it should be the jury's prerogative to accept or reject the respective theories, not the Government's. The Government, as does *Buckner-Cheek*, thus shows a disrespect for the ability and the right of juries to make the willfulness determination.

Lastly in this regard, the Government makes no suggestion or showing that the policies behind our nation's tax laws have been frustrated by the use of the subjective standard in the other Circuits.[6]

The Government does not deal at all with the many practical difficulties in applying *Buckner-Cheek*. (*Petitioner's Br.*, pp. 33-36). Under *Buckner-Cheek*, other anomalies exist. For example, a defendant who has failed to file tax returns could plead guilty by telling the Court: (a) that he did not file his tax returns, and (b) that he did so because he possessed a sincere but erroneous understanding or belief which is on the "forbidden list." He could plead guilty despite the fact that he lacked criminal intent, although he would be sentenced under applicable sentencing guidelines for what is defined as a willful offense. Surely, the Government cannot contend that such a result ought to be the law of the land.

The Government next argues that the "legal arguments" petitioner raised in his defense were, as the Court of Appeals held, not objectively reasonable. (*Gov't Br.*, pp. 29-30). Once again, the Government misapprehends the entire thrust of petitioner's argument. Petitioner did not

---

[6] Indeed, in a more traditional tax shelter prosecution, the Government argued that "willfulness is a factual question of his subjective intent, not a legal question of the objective certainty in the law." *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987), *cert. dismissed*, 483 U.S. 1042 (1987). Now the Government wants this Court to treat tax protesters differently.

make *legal* arguments that, *e.g.*, wages were not income. Rather, petitioner made a *factual* argument at trial that at the time of the alleged offenses he honestly and in good faith believed what he was taught: that wages were not income. Whether, in fact, petitioner's belief or understanding in this regard was held sincerely and in good faith or was pretextual is a fact question for the trier of fact – in this case, the jury. Once again in its discussion, the Government totally ignores the relevance and materiality of the evidence as to the genesis of Cheek's erroneous beliefs.

There is no question but that the Government can cite legal authority indicating that Cheek's understandings were wrong as a matter of law. (*Gov't Br.*, pp. 30-31). And even if such arguments are, as a matter of civil law, deemed frivolous, that should not mean that the good faith holding of them can *never* be a defense. Once again, the Government mischaracterizes Cheek's defense when it states, "This is not a case in which petitioner claims he was unaware of his duties under the tax laws. His defense was that while he was aware of those duties, he did not believe that they could be properly imposed on him." (*Gov't Br.*, p. 31). Apparently, we need to repeat it so the Government can hear: Cheek's defense was that he had a *bona fide* misunderstanding as to *his* duty to file. *Murdock*, *Bishop*, and *Pomponio* give Cheek that defense; *Buckner* tries to take it away.

The Government, in a fitful attempt to redefine the battlefield in terms favorable to it, also tries to recharacterize Cheek's defense as "essentially beliefs that the tax laws violate the Constitution." (*Gov't Br.*, pp. 31-32). Again, this was not an aspect of Cheek's asserted understandings which were impacted by *Buckner-Cheek*. For example, Cheek's understanding that wages were not income is not a constitutional argument. It may seem an absurd view to lawyers for the Government and even to this Court, but it is not beyond the experience of the law that a person could sincerely, although erroneously,

believe it.[7] Indeed, at least some of the jurors and the trial court thought Cheek honestly, but foolishly, held such a belief. (*Petitioner's Br.*, pp. 11-13). Thus, this Court need not reach the question of whether a good faith understanding that a tax law is unconstitutional can be a defense; the issue simply is not present in this case and is not before the Court. One could certainly argue, however, that a person who contends that he believed a law to be unconstitutional is acknowledging that he knows what the law is.

The Government next claims that Cheek's position is inconsistent with general principles of *mens rea* under the criminal laws.[8] (*Gov't Br.*, pp. 34-38). Nothing could be more inaccurate. One of the cornerstone principles of *mens rea* under the criminal law in this country is the right of a defendant to have a jury decide whether it exists. The Government obviously believes that juries will stand in the way of its effective rounding-up of annoying tax protesters. This is both a dangerous notion and is insulting to the faith that the Government should have in juries. It is a fear not borne out in the other Circuits. Once again, the Government tries to redefine the term "belief" to mean a matter of personal faith and conviction. (*Gov't Br.*, p. 35). That, of course, is not the relevant meaning of the term "belief." As we stated earlier, the term "belief" is the term used by the Seventh Circuit. It is not our term. The Seventh Circuit uses the term "belief" interchangeably with the term "misunderstanding" as used in

---

[7] Cheek was indoctrinated, *inter alia*, that the wages of a privately-employed person represent an even exchange of his labor for money, and thus no gain is realized. (*Jt.App.* 48, 55, 57).

[8] The Government acknowledges that criminal culpability is based on the actor's mental state, in relation to external factors. (*Gov't Br.*, p. 35). But *Buckner-Cheek* violates this notion, because it excludes external factors, such as the genesis or basis for a defendant's understanding.

Murdock. We are in no way suggesting that Cheek or anyone else is immune from criminal prosecution if he knows what the law is, but believes it should be otherwise, and therefore violates it.

The Government, in this section of its Brief, reveals a palpable frustration over the jury's hesitation in convicting Cheek, even with the helping hand of the *Buckner* instruction.[9] (*Gov't Br.*, p. 37). This impatience underscores the need to have juries make such determinations. The subjective test – which has been adopted by numerous Circuits, apparently without difficulty – does not, as the Government claims, "reward sincerity of belief, even when the defendant knows that the belief has been rejected as legally unsound." (*Gov't Br.*, p. 38). The instructions, mandated by *Murdock*, *Bishop*, and *Pomponio* and applied by the other Circuits in this country, adequately protect both the defendant's constitutional rights and the Government's legitimate concerns. *Buckner-Cheek* caters to the Government's illegitimate concerns.

II. Constitutional Issues

Even were the Government convincing in overturning over 40 years of this Court's statutory construction, the Constitution of the United States would pose a barrier. The most obvious constitutional failing of the *Buckner-Cheek* doctrine is its retroactivity and its related unforeseeable, but inevitable, expansion of its list of forbidden beliefs. In response to this argument, the Government makes two statements. First, it attempts to interpose the procedural objection that retroactivity was not raised in the Court of Appeals or in the *certiorari* petition, and it

---

[9] It is doubtful that a jury of (presumably) taxpaying citizens ordinarily starts out with much sympathy for a defendant like Cheek. Any such defendant faces an uphill battle in convincing a jury of his *bona fides* – even under the subjective standard. The Government does not need the boost of *Buckner-Cheek*.

is not properly before the Court. Second, it makes the remarkable assertion that *Murdock* in 1933 and the Seventh Circuit's *dictum* in *Moore*[10] in 1980 put Cheek on notice that in his Circuit the "objectively reasonable" requirement prevailed under the criminal tax laws. In making this latter argument, the Government misinterprets *Murdock* and ignores entirely *United States v. Dack*, 747 F.2d 1172 (7th Cir. 1984), in which the Seventh Circuit expressly held that the *subjectively reasonable* standard applies to tax protester cases.

As to the first point, petitioner, both in the Court of Appeals and in his petition for a writ of *certiorari*, squarely presented the question of the constitutionality of the *Buckner-Cheek* doctrine. Petitioner's appellate brief recognized that *Buckner* was the established law of the Seventh Circuit, and urged the Circuit to reverse itself. *See* Cheek's Brief on Appeal, pp. 31-32. In its opinion, the Seventh Circuit declined to abandon *Buckner*. Express and essential elements of *Buckner-Cheek* are, of course, its retroactivity and its ever-expanding list of forbidden beliefs. In the *certiorari* petition, likewise, Cheek squarely presented the question of whether the *Buckner-Cheek* doctrine is consistent with the Fifth Amendment. Thus, the issue is certainly before this Court.

Second, as stated in our Brief, *Marks v. United States*, 430 U.S. 188 (1977), by itself requires reversal of Cheek's conviction. *Buckner*, which was decided on October 1, 1987, was applied to offenses which were allegedly committed by Cheek between 1981 and April 1987, prior to the date of *Buckner*. Indeed, *Buckner* was decided after the superseding indictment of Cheek and just before Cheek's trial commenced. (*Jt.App.* 2). The Government claims that its unique (and, as discussed above, erroneous) reading of *Murdock* put Cheek on notice that the objectively reasonable standard was the law of the Seventh Circuit.

---

[10] *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

(*Gov't Br.*, p. 39). The Government is less than forthright with this argument, because it wholly fails to remind this Court of the Seventh Circuit's 1984 holding in *United States v. Dack, supra*, in which the Seventh Circuit expressly held that the *subjectively reasonable* standard applies in tax protester cases. Thus, the Government's argument is that while Cheek was put on notice by *Murdock* of the "objectively reasonable" standard, the judges of the United States Court of Appeals missed such notice, and *Dack* was the result. While the Government clearly has little regard for Cheek's efforts as a legal researcher, it imposes on him a standard of prescience exceeding that of the judges of the Seventh Circuit who decided *Dack*. The fact remains that retroactivity is a fatal flaw in *Buckner-Cheek*. Cheek was tried for offenses which occurred before the unique "objectively reasonable" standard was applied, even in the Seventh Circuit. Indeed, Counts Eight, Nine, and Ten of Cheek's indictment should have been tried under *Dack's* standard; for that was the law of the Seventh Circuit on the dates of those alleged offenses. *Buckner-Cheek's* retroactivity is both unconscionable and unconstitutional, and this Court should not permit it.

The Government denies that there is any other Fifth Amendment problem with the Court of Appeals' "preemptive strike" prong of *Buckner-Cheek* that certain beliefs are not objectively reasonable, and can never provide a defense, no matter what the external circumstances. (*Gov't Br.*, pp. 40-42). The Government again argues that at trial Cheek contended that the tax laws are unconstitutional. But this is clearly not the issue before this Court. In the alternative, the Government argues that even if Cheek's belief that his wages were not income was based on the Internal Revenue Code, rather than the Constitution, the *Buckner-Cheek* doctrine is still correct. The Government says, "Objective reasonableness is not a factual issue as to which different juries should be permitted to reach different conclusions." (*Gov't Br.*, p. 42). This statement is incorrect and illustrates the difficulties

that the Fifth and Sixth Amendments pose for the *Buckner-Cheek* doctrine. The whole purpose of our jury system is to permit different juries to reach different conclusions based on different sets of facts presented by different defendants. For example, a defendant who claims to have come to understand that wages are not income because he saw it written in the sky one day may well be convicted by a jury. A defendant who claims to have come by his understanding that wages are not income because he went to seminars at which tax lawyers spoke, and because he read their pamphlets and received their opinion letters to that effect, may have an entirely different outcome before a jury. There simply are differences among defendants, both as to beliefs (or understandings) that they harbor and as to the bases for the beliefs that they harbor. *Buckner-Cheek* eliminates any individualized consideration by a jury of the willfulness or lack of willfulness of a particular defendant. That is a defect of constitutional dimension. See *Cabana v. Bullock*, 474 U.S. 376, 384 (1986); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Morissette v. United States*, 342 U.S. 246 (1952).

The Government recognizes its dilemma by making one additional argument. The Government says (*Gov't Br.* p. 42) that "even if the issue of objective reasonableness is considered a factual issue for the jury, it was not necessary to submit the issue to the jury in this case, because there was no basis on which any fact finder could conclude that petitioner's views were objectively reasonable." And, indeed, the Government suggests that "in a close case" the question should be submitted to the jury. (*Gov't Br.*, p. 15). These observations apparently refer to the evidentiary requirement that a defense reach a certain sufficiency threshold before it can be argued and before the jury can be instructed about it. We have no quarrel with that long-standing rule of criminal law. However, the issue of whether Cheek's defense was sufficient to surpass that threshold is simply not before this Court. The trial court in the case at bar clearly found that

Cheek's defense surpassed that threshold. Indeed, he instructed the jury on it. (*Jt.App.* 80-81). A jury can be told that a defendant misunderstood the tax laws, that is, that the defendant's proffered belief is wrong as a matter of law. But even if objective reasonableness were a requirement, it would still be a jury question as to whether that defendant's holding of the misunderstanding is reasonable under *all* of the circumstances. The fact remains that a reasonable jury could have found that Cheek was indeed a gullible and misguided victim caught up in the tax protest movement.[11] And again, the Government makes no attempt to justify the fine factual distinction that it has drawn between petitioner Cheek, whose beliefs (in the Government's view) are bizarre and unreasonable, from Government witness Pacelli, whose beliefs were identical to Cheek's, but who was not deemed by the Government to have criminal intent. (*Petitioner's Br.*, pp. 32-33).

Clearly, the Government knows (or believes?) that the question of a defendant's criminal intent is for the jury to decide. A wholly frivolous defense by a tax protester, that is, a defense without any evidentiary support or evidentiary genesis, could always be precluded under the well-established principles of criminal law. Thus, *Buckner-Cheek* not only improperly imposes the "objectively reasonable" requirement, but also takes its determination away from the jury as to beliefs on its forbidden list.

Lastly, the Government makes light of Cheek's First Amendment arguments, relegating them to a footnote.

---

[11] The Government incorrectly suggests (*Gov't Br.*, p. 17, n.9) that gullibility was not Cheek's defense in the court below. It certainly was part of his *pro se* defense that he had listened to what tax protester lawyers had told him, and that at the time he believed it. (*Jt.App.* 46-59).

(*Gov't Br.*, pp. 35-36, 42 n.27). We are not, in this argument, seeking to excuse Cheek or anyone else from criminal liability, simply because he may have a subjective belief in the justice or soundness of a cause. The entire *Buckner-Cheek* doctrine was expressly directed at a particularly annoying group of defendants – tax protesters – based on the content of their views.[12] That should be a First Amendment concern to this Court, even though we concede that the *Buckner* instruction itself does not punish the mere holding of beliefs. The doctrine is clearly not content neutral, however, for it burdens certain beliefs due to their content. And a belief (or understanding) which is reasonable today could be judicially declared to be unreasonable tomorrow, at the sole discretion of the Seventh Circuit.

The unsoundness and danger of *Buckner-Cheek* could not be clearer. And the Government nowhere in its Brief deals with the problem posed by the ever-expanding and unknowable list of forbidden beliefs. Indeed, the Seventh Circuit has done it again. Since our Brief was filed with this Court, the Seventh Circuit has decided *United States v. Dunkel*, 900 F.2d 105 (7th Cir. 1990), in which the list of forbidden beliefs has grown again. In affirming Dunkel's tax convictions, the Seventh Circuit expressed its surprise to discover that the district judge had allowed Dunkel's lawyer to present evidence and argue to the jury that Dunkel's belief that "taxes are voluntary" could be a defense to a criminal prosecution. Apparently, the district

---

[12] Recently the Seventh Circuit, in reversing a more traditional tax defendant's conviction for skimming business receipts, condemned the jury instruction which was given on skimming by finding that the instruction amounted to a " . . . substitution of a formalistic test for the jury's evaluation of the facts." *United States v. Toushin*, 899 F.2d 617, 623 (7th Cir. 1990). Yet, as to tax protester defendants, the Seventh Circuit imposes the "formalistic test" of *Buckner-Cheek*, without apparent qualms.

judge in *Dunkel* recognized the pitfalls of applying *Buckner-Cheek* in its entirety, and chose to deviate from it. Observed the Seventh Circuit in *Dunkel*, "Like the Lord High Executioner in the *Mikado*, we've 'got a little list' of beliefs that are objectively unreasonable. . . . We add to that list the belief that payment of income taxes is 'voluntary.' "[13] *Dunkel*, 900 F.2d at 108. The offenses for which the jury convicted Dunkel allegedly occurred in 1981 and 1982. Yet, eight years later, and after his trial, the Seventh Circuit declared his beliefs unworthy of supporting a defense, even though the declaration was unnecessary to the affirmance of Dunkel's conviction. What beliefs or defenses or misunderstandings in the future will a federal judge declare cannot ever be objectively reasonable?

Buckner-Cheek is unfair. It is fraught with practical problems, and it is unnecessary. The Government does not need *Buckner-Cheek*. Like a quarterback fearing a sack, the Government has scrambled to try to justify it to this Court. The tax collection system has proceeded for years outside the Seventh Circuit with no perceived problems under the "subjectively reasonable" standard which has been a traditional standard for willfulness in this country for 200 years. To make *Buckner-Cheek* the law of the land would be to turn our back on this heritage.

It is easy for the Government to ridicule persons like Cheek who fall under the sway of the tax protester gurus. "Their views are ridiculous," the Government argues (to paraphrase), "therefore, let's not bother and confuse juries with them." But harboring ridiculous views is not criminal intent. And the core fact question – whether Cheek's understanding was sincere or pretextual – is the kind of issue that juries have an almost mystical ability to decide accurately.

---

[13] Of course, in the *Mikado* the Lord High Executioner is a comic buffoon who at the end of the opera loses the fair young maiden. F. Moore, *Crowell's Handbook of Gilbert and Sullivan*, 69-76 (1962). A similar fate should befall *Buckner-Cheek*.

Buckner is unwise, unfair, and unnecessary. It not only imposes an "objectively reasonable" standard on criminal intent, but it also gives the courts power to declare, on an *ad hoc* basis, new forbidden beliefs which become "annoying," and bar them retroactively.

We have a commitment in our system of justice to trust and rely on the collective wisdom of twelve jurors to determine whether one of our citizens should be forever branded a criminal. Only this Court can remind the Government and the Seventh Circuit of this fact.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court REVERSE the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM R. COULSON*
CHERRY & FLYNN
30 North LaSalle Street
Suite 2140
Chicago, Illinois 60602
(312) 372-2100

SUSAN M. KEEGAN
30 North LaSalle Street
Suite 2140
Chicago, Illinois 60602
(312) 372-2100

Attorneys for Petitioner
** Counsel of Record*

June 18, 1990